

COMMITTEE ON COMMERCE AND TRADE
MICHIGAN HOUSE OF REPRESENTATIVES

HEARING
“SENATE BILL NO. 490, A BILL TO AMEND
MICHIGAN’S PRESERVATION OF PERSONAL PRIVACY ACT”

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Chairman Graves, Majority Vice-Chair Sheppard, and Members of the Committee, my name is Ari Scharg and I am a Partner and Chair of the Privacy and Data Security Group at Edelson PC, a consumer protection firm that focuses on privacy and technology issues. I want to thank you for allowing me to testify in opposition of Senate Bill No. 490, which is known as the Bill to Amend the Michigan Preservation of Personal Privacy Act ("Privacy Act"). I currently represent over one million Michigan residents in civil enforcement actions under the Privacy Act and believe that I can provide the Committee with unique insight into the consequences of SB 490, which, if passed, would eviscerate the important personal privacy rights and protections that consumers in the State of Michigan have enjoyed—and come to expect—for nearly 30 years.

I would like to begin with a brief history of the Privacy Act. In 1987, Judge Robert Bork was nominated by President Reagan to the United States Supreme Court. During the course of the confirmation proceedings, a Washington, D.C. newspaper printed a list of all the videotapes that Judge Bork rented from his local video store in an effort to expose his conservative philosophy and positions on abortion, affirmative action, and First Amendment rights. The title of the article was "The Bork Tapes: Never mind his writings on Roe v. Wade. The

inner workings of Robert Bork's mind are revealed by the videos he rents." Needless to say, many deemed the article to be an outrageous invasion of Judge Bork's privacy. Congress responded immediately by passing—with *bipartisan unanimous support*—the federal Video Privacy Protection Act, a law which prohibits businesses from disclosing their customers' video viewing histories. At that time, Congress also called on the States to enact legislation to go even further to protect their residents' privacy rights.

The State of Michigan answered, and in 1989, enacted legislation to protect its consumers' personal privacy in buying and renting videos, books and other reading material, and sound recordings. That legislation is the Michigan Preservation of Personal Privacy Act, and it was passed because, according to the Legislature, "a person's choice in reading, music, and video entertainment is a private matter, and not a fit subject for consideration by gossipy publications, employers, clubs, or anyone else for that matter." H.B. No. 5331 (Jan. 20, 1989). The purpose of the Privacy Act is consistent with an individual's natural right to receive information and ideas to satisfy one's intellectual and spiritual needs, and meant to bolster the privacy one has in pursuing that satisfaction and ultimate happiness. Indeed, Michigan Attorney General Bill Schuette stated in a recent

court filing that: “prohibiting disclosure of the personal information at issue directly protects Michigan citizens against unwanted intrusions into their private affairs, and promotes the pursuit of intellectual and spiritual fulfillment without being subjected to the scrutiny of others.”

In 2010, my firm began conducting a wide-ranging investigation into the privacy practices of several consumer facing industries, including the data mining industry and the magazine publishing industry. What we, with the help of our team of forensic investigators, eventually discovered is that many (but certainly not all) magazine publishers secretly sell and trade their customers’ detailed subscription records—including their customers’ full names, home addresses, and magazine subscription titles—to a number of third-party companies, including data miners like Acxiom and Experian. These publishers don’t obtain (or even ask for) their customers’ permission to make the disclosures. To the contrary, these publishers actively hide their disclosure policies from their customers and the public in order to continue making tens of millions of dollars a year from the sale of their protected information.

Michigan Attorney General Schuette perhaps said it best in a recently filed court document: Some magazine companies consider each

subscription “to be a permission slip that allows them . . . to freely ignore the privacy of their customers and disclose personal information for the company’s own economic gain.” As a result of our investigation, Michigan consumers began filing civil actions to enforce their rights under the Privacy Act, and have been winning.

In response to the enforcement actions, the Association of Magazine Media mobilized to spearhead the passage of SB 490. What the magazine publishers and other tech companies want from this bill is the freedom to sell and trade their customers’ protected reading and video viewing information behind their backs and without their knowledge or consent, which is exactly what the proposed amendments are carefully designed to accomplish.

Before moving on, I want to stress how easy it is for a company to comply with the Privacy Act. The Privacy Act is a “consent” statute, meaning that if a company wants to disclose or sell its customers’ protected information, all it has to do is get consent to make the disclosures, which is usually done through its terms of service. Additionally, the statute also allows companies to disclose their customers’ protected information for marketing purposes if the customer is notified of the practice and given an opportunity to opt out.

And of course, disclosures may be made if necessary to collect payment from the customer or comply with a warrant or court order. But for purposes of this discussion, it is important to understand that the Privacy Act already allows magazine companies to disclose their customers' information as long as they are transparent about their practices.

With that in mind, I will turn to the motivation and purpose behind the Bill and then discuss some of the specific amendments being proposed.

The Association of Magazine Media's story about why SB 490 is necessary is nothing more than pretext to introduce a bill that would legalize the publishers' disclosures to data mining companies without having to ask for permission or even disclose the practice to their customers.

Data miners are companies that construct highly intrusive consumer profiles by collecting massive amounts of information on almost every individual and household in the country. This information is then analyzed to make inferences about each individual's personality, including their interests, lifestyle, financial

status, health, and character. From there, the data miners group consumers into categories known as “segments” using the derived inferences to predict behavior and create a narrative about their lives. The data miners then sell these segments to anybody willing to pay for them, and in doing so, generate annual revenues in excess of \$60 billion.

Not surprisingly, magazine subscription records are among the most valuable data points that are used when creating these segments given that they directly reflect consumers’ personal interests and provide a window into each individual’s loves, likes, and dislikes. For example, a list of Michigan gun owners and enthusiasts is easily compiled simply by identifying individuals that subscribe to magazines like *Guns and Ammo* or *Shooting*. Many publishing companies generate tens of millions of dollars per year by disclosing this information to data miners. That is the motivation behind the proposed amendments.

I will now discuss some of the specific problems with the language of SB 490, but due to time constraints I will not be able to address all of them. I am of course happy to follow up separately if anybody would like a comprehensive list.

First, the proposed modifications seek to include a loophole that would allow companies to disclose their customers' protected information without consent so long as they provide notice of their practices *somewhere* in their magazines or *somewhere* on the internet. Such an amorphous notice requirement is inconsistent with the purpose of the Privacy Act, which was specifically designed to ensure that Michigan consumers are able to make informed decisions about their personal privacy and protected information. This loophole would have a profoundly adverse effect on Michigan's seniors and elderly, who represent a major portion of the magazine subscription population and who usually lack access and sophistication when it comes to the internet and can't be counted on to read the "fine print" hidden in the back of a magazine (especially if they don't even know what they're looking for).

SB 490 would also amend the Privacy Act to allow companies to disclose their customers' protected information when marketing to other "potential" customers. But this amendment would lead to an absurd result that would actually legalize the exact disclosures that the Privacy Act was meant to prohibit.

Indeed, by allowing the disclosure of protected information to market to “potential” customers, a company would be allowed to disclose a customer’s entire video viewing history to the public as long as it was part of an advertisement. For example, in Judge Bork’s case, his video rental store could have published his entire movie list in a newspaper alongside an advertisement that said something like, “Want to understand the inner workings of Judge Bork’s brain? All movies on his video list are 50% off.” Likewise, Netflix would be allowed to run advertisements during election cycles that identify each candidate’s video viewing history in an effort to attract new customers. There are countless examples to demonstrate why the “potential” customer amendment is nonsensical and being pursued in bad faith.

The last proposed modification that I’ll discuss today is the proposal to strip away the Privacy Act’s statutory damages remedy. The Privacy Act currently provides for statutory damages in the amount of \$5,000 to “offer more in the way of recourse for injured parties.” H.B. No. 5331. The proposed amendment to the Act gets rid of the statutory damages provision and, instead, imposes an additional restriction on consumers that would prohibit them from bringing a lawsuit unless they can prove that they suffered some sort of financial harm resulting from the company’s secret disclosure.

This is highly problematic for two reasons. First, it ignores that the unlawful disclosures, on their own, cause harm to consumers by violating their personal privacy. Indeed, courts in the Eastern District of Michigan have recently found that the Privacy Act's statutory damage provision serves a "compensatory" purpose by compensating aggrieved consumers for the invasion of privacy. Second, stripping away the statutory damages remedy virtually guarantees that the law won't ever be enforced, and thus, virtually guarantees that the Privacy Act will be ignored by businesses.

Ultimately, without the availability of statutory damages, businesses won't have any incentive to comply with the Privacy Act and would have the freedom to sell their customers' protected information without any fear of liability.

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Unfortunately, if any one of these proposed amendments are passed as drafted, nearly 30 years worth of significant personal privacy rights and protections that consumers in the State of Michigan have enjoyed—and come to expect—would be eviscerated.

I want to conclude by noting that in this era of technology and data mining, States are focused now more than ever on strengthening their privacy and consumer protection laws. In fact Representative Lucido has recently introduced three new privacy bills that would do just that. This is not the time to undercut or weaken consumer privacy rights, especially when it would benefit companies that have no concern for Michigan consumers' rights to begin with. Indeed, the out-of-state magazine publishing companies behind this Bill know that they're violating Michigan law, yet haven't even put their illegal disclosure practices on hold during the legislative process. Instead, they want you to wipe away all liability for their past and continuing misconduct by giving SB 490 retroactive effect.

If SB 490 is signed into law, the Privacy Act would go from being the strongest consumer privacy law in the country to the weakest. And of course, we've mostly been talking about this issue in the context of the magazine industry, but it goes without saying that other online and mobile app companies would use this new Bill to exploit Michigan consumers in the same way.

On behalf of the over one million Michigan consumers that I

represent, I strongly urge you to vote against SB 490.

Thank you for your time and consideration.